

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 376/2009

In the case between:-

THE STATE

and

NTJANYANA EPHRAIM NYELELE
TEBOHO PIET MATSOSO

CORAM: CILLIé, J *et* JORDAAN, J

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 3 SEPTEMBER 2009

[1] In this matter both accused were charged with robbery. Accused number 1 pleaded guilty whilst accused number 2 pleaded not guilty. During the questioning of accused number 1 in terms of the provisions of section 112 of the Criminal Procedure Act, No. 51 of 1977 it appears that accused number 1 alleged that the complainant stabbed him with a knife as a result of which he hit the complainant with an iron rod. His plea

was accordingly changed to one of not guilty and the trial proceeded.

[2] The complainant was the only witness for the state. According to him he was walking in the street during the evening of the 6th of December 2008 when he met one Mohlobeng whom he asked for matches since he wanted to have a smoke. He suddenly felt a blow to his forehead as accused number 1 hit him with an iron rod. Accused number 2 also hit him with some sort of unidentified weapon over the head. Accused number 2 continued to assault him and during the assault both accused searched him and removed his tobacco from his person. Because of the assault he fell down and only woke up at the same place the next morning when he realised that not only his tobacco but also his money in the amount of R400,00 were missing. He denied that he had any weapon and specifically that he had a knife with him or in his possession.

[3] Both accused (who were unrepresented) testified. According to accused number 1 he was walking in the street followed by

accused number 2 and one Mafireka. He saw two people in front of him, one of which later appeared to be the complainant. The other one exclaimed as if frightened and ran away whereupon accused number 1 went to the complainant and asked him what happened. Without answering the complainant suddenly stabbed him in his hand with a knife whereupon he hit the complainant with an iron rod next to his eye of his forehead. At that stage accused number 2 and Mafireka caught up with them and accused number 1, left the scene. He stated that he hit the complainant because the complainant stabbed him with a knife and furthermore denied taking anything from the complainant. While he was leaving the scene he however noticed that the said Mafireka kicked the complainant who was lying on the ground. He did not see accused number 2 doing anything to the complainant and did not notice any form of weapon in the possession of accused number 2.

- [4] Accused number 2 corroborated the version of accused number 1 in all material respects. He saw the complainant stabbing accused number 1 where after accused number 1 hit the

complainant with an iron rod and the complainant fell to the ground. Accused number 1 then walked away but Mafireka started kicking the complainant. Accused number 2 then tried to help the complainant onto his feet by pulling on his arm, but, being unsuccessful, left the complainant there. He denied assaulting the complainant or taking anything from the complainant.

[5] The trial court convicted accused number 1 of assault with intent to do grievous bodily harm and accused number 2 of robbery. Accused number 1 was sentenced to 8 months imprisonment suspended for 3 years conditionally and accused number 2 for 12 months imprisonment conditionally suspended for 3 years.

[6] In his judgment the trial magistrate found (erroneously) that the version of the complainant and those of the 2 accused are non-contradictory and in essence the same, except the complainant's evidence to the effect that accused number 2 also assaulted him and took his property. He found that

accused number 1 hit the complainant after being stabbed by the complainant and therefore did not act in self-defence but in retaliation. I quote the relevant portion of the magistrate's reasoning in his judgment verbatim:

"But there is evidence before this court that there was, one of these people who was screaming, therefore it becomes clear that there was something that happened between Motlabeni and the complainant and Motlabeni ran away. And when the complainant saw any person coming to him he thought that they were going to attack him. That is why he stabbed the accused number 1 when accused number 1 comes to enquire as to what the problem is. But now accused number 1, after being stabbed, he then decided to take the law into his own hands by hitting the complainant with a kirie and after hitting the complainant with an iron rod he does not care as to what happened to the complainant and the complainant fell to the ground and his companion came to kick him. But now the question is whether the accused number 1 had the intention to rob the complainant of anything. Therefore the only conclusion that we can reach is that accused number 1 had no intention to rob the complainant, but the accused did assault the complainant. Therefore accused number 1 is found guilty of assault with intent to do grievous bodily harm."

- [7] The trial court was asked for reasons for both convictions and in regard to accused number 1 the learned magistrate said the following:

“In my opinion if we take the accused 1’s version as the truth of what transpired on the day in question, accused 1 struck the complainant only after the attack has already ended. The reason as to why accused number 2 (sic) hit the complainant is not in my view that he acted in self-defence but wanted to satisfy himself that he did hit the complainant because the complainant stabbed him with a knife as he suggested. It is therefore the reason why he was convicted.”

- [8] From the evidence it is clear that there was no basis for the aforesaid finding. The accused was unrepresented and there was a duty on the court to fully investigate the accused’s plea of self-defence. The accused was never asked whether he regarded the attack of the complainant on himself as finished or ended when he hit the complainant and there was no basis to find that the accused should have realised that the complainant would not continue assaulting him before he struck the

complainant. The conviction was clearly misconceived and wrong.

- [9] As far as the conviction of accused number 2 is concerned the magistrate gave the following reasons for conviction and I quote verbatim:

“The complainant told the court that accused 2 who was in the company of accused 1 assaulted him and took from his person cash in amount R400,00 and a packet of tobacco. Accused 2 did deny this, but admitted that at one stage he touched the complainant in order to assist him after being struck with a rod and been kicked by another person who was with them. Complainant said he lost his money and tobacco and this was not taken by accused 1 – or that other person. The only conclusion that can be reached is that accused 2 is the one who removed these items from the person of the complainant. These are the reasons the two accused was so convicted.”

- [10] The trial court made no adverse finding as to the credibility of accused 2 and it does not appear that there are any reasons why the complainant's version should be preferred above that

of accused 2. What is more, the complainant testified that accused number 1 also took part in the search and removal of his tobacco before he fell to the ground and the trial court did not regard that as compelling evidence to convict accused 1 of robbery as well. Even if it is accepted that the complainant realised that money was taken from him when he woke up in the morning, the fact is that the aforesaid Mafireka was also present and moreover the complainant spend the whole night at that spot before he realised that the money was taken away in the morning, in which time span anything could have happened. The conviction of accused number 2 can also not stand.

[11] In the result the convictions and sentences in respect of both accused are set aside.

A. F. JORDAAN, J

I concur.

C. B. CILLIÉ, J

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